2002

A.K. & R. Whipple Plumbing and Heating v. Thomas D. Guy and Aspen Construction, a Utah corporation : Appellant's Reply Brief

Utah Supreme Court

IN THE UTAH SUPREME COURT

A.K. & R. WHIPPLE PLUMBING AND HEATING,	*	Priority No. 15
Plaintiff/Appellee,	*	No. 20020495 – SC
vs.	*	Trial Court Case: 940300014CN
THOMAS D. GUY and ASPEN CONSTRUCTION, a Utah corporation,	*	
Defendants/Appellants	*	

APPELLANTS' REPLY BRIEF

on certiorari from a decision of the Utah Court of Appeals
on appeal from an Order of the
Third Judicial District Court
Summit County, Utah
The Honorable Frank G. Noel, Presiding

Joseph M. Chambers (0612)
HARRIS, PRESTON & CHAMBERS, P.C.
31 Federal Avenue
Logan, UT 84321
Attorney for Defendants/Appellants

Steven B. Wall, Esq.
WALL & WALL
5200 South Highland Drive, Suite 300
Salt Lake City, UT 84117
Attorney for Plaintiff/Appellee

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Logan, UT 84321
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Steven B. Wall, Esq.
WALL & WALL
5200 South Highland Drive, Suite 300
Salt Lake City, UT 84117
Attorney for Plaintiff/Appellee

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A. Whipple Misstates the Homeowner's and Builder's Argument Regarding "Prevailing Party" and "Successful Party." Homeowner and Builder in Fact Concede the Terms Have Been Used Interchangeably and are Synonymous.

Whipple incorrectly represents that the homeowner and builder "... *claim that the term prevailing party and successful party are mutually exclusive. ...*"[1] The homeowner and builder do not now, nor have they ever maintained, that the terms "prevailing party" and "successful party" are mutually exclusive. What the homeowner and builder have continuously asserted is that in the context of a mechanics' lien case, the term "successful party" has, without any deviation, been interpreted by this Court to require ***the application of a legal standard that resulted in an outcome which was mutually exclusive*** (i.e., one was either successful in obtaining an order of foreclosure with respect to the mechanics' lien or the other party was successful in preventing the mechanics' lien claimant from obtaining an

[1]Whipple Brief page 10.

order of foreclosure). *"It will be noted that the statute confers the benefit not only on the one who asserts the lien but on the 'successful party'; in this instance the plaintiff [homeowner], who defended against the lien."* Palombi v. D & C Builders, 22 Utah 2d 297, 452 P.2d 325, 327-328 (1969); *"¶ 9 A successful party includes one who successfully enforces or defends against a lien action. See Reeves v. Steinfeldt, 915 P.2d 1073, 1079 (Utah Ct. App.1996); Palombi v. D & C Builders, 22 Utah 2d 297, 300-01, 452 P.2d 325, 327-28 (1969)."* Kurth v. Wiarda, 991 P. 2d 1113, 1116 (Utah App. 1999).

The homeowner and builder have never maintained that the terms "prevailing party" and "successful party" are mutually exclusive. On the contrary, homeowner and builder agree with the comments by the court of appeals in Whipple II at ¶11, that the two terms have been used interchangeably, however, subject to an important qualification. Qualification: When the two terms have been used interchangeably, in the context of a mechanics' lien case, they have always referred to the historical legal standard, referred to above (an outcome that was mutually exclusive) - not the "flexible approach" standard which the court of appeals in Whipple II has now substituted in place of this Court's prior decisions. See pages 11 -12 of Appellants' Brief citing eight mechanics' lien cases. In one of the cases, ProMax Development v. Raile, 998 P. 2d 254 (Utah 2000) this Court uses both terminologies (prevailing party ¶2 and successful party ¶12) but applied the historical standard. In J.V. Hatch Const., Inc. v. Kampros, 971 P.2d 8 (Utah App. 1998) the court of appeals stated: *"A party in a mechanics' lien foreclosure action is not a prevailing party until after a determination on the merits is made by either a jury or a trial court judge."*

See also text at headnotes 7 and 8 discussing lien claimant's *primae facie* evidence of entitlement to attorney fees which is met by showing that it is the "prevailing party." Notwithstanding, the court of appeals applied the historical standard. Both terms have been used interchangeably in other opinions as well. Brookside Mobile Home Park, Ltd. v. Peebles, 48 P.3d 968 (Utah 2002); Softsolutions, Inc. v. Brigham Young University, 1 P.3d 1095, (Utah 2000).

The court of appeals' error was not in judicially declaring that the two terms were synonymous. The error was in declaring that *"our 'prevailing party' jurisprudence"* (an unequivocal reference to the application of their flexible approach jurisprudence) was controlling in the context of a mechanics' lien case. This occurred when they referred to their prevailing party legal analysis ("jurisprudence" as they refer to it) adopted in Mountain States Broadcasting Co. v. Neal, 783 P.2d 551 (Utah App. 1989), a contracts case involving "prevailing party" language, and then declared that this "flexible approach" jurisprudence was also controlling as to the outcome of this case, a mechanics' lien case involving a very specific statutory framework mandated by the legislature. The logical fallacy was committed in ¶12 when after citing their Mountain States Broadcasting case (and the flexible approach legal analysis employed therein), they went on to implicitly overrule the prior decisions of this Court and replace the historical legal standard with their flexible approach - prevailing party jurisprudence. This was *"fait accompli"* when the court of appeals stated without any meaningful discussion or qualification: *"Finally, application of our "prevailing party" jurisprudence to section 38-1-18 does not detract from its objective."* Whipple II, ¶12. Not

only does their flexible approach jurisprudence detract from the legislative intent behind §38-1-18, it totally negates the legislative intent and does so in a way which not only ignores the proper role of the judiciary viz-a-viz the legislature, but also the clear precedent of this Court. (This latter point is discussed more fully below.)

Whipple states that *"Aspen has not cited any case law or statute that demonstrates that the term 'successful party' or the criteria to determine 'successful party' is or has been different from the term 'prevailing party' or the criteria to determine prevailing party."*[2] Until Whipple II this statement was true. The terms were synonymous and referred to the same standard, i.e., the historical "successful party" standard. For proof that the standards are now different one has only to read the editorial notes supplied by the West editors in headnote eight (8). In head note eight (8), West editors provide the following summary of the court of appeals' opinion in Whipple II:

> [8] "A key part of the flexible approach to deciding who actually is the prevailing party in a mechanic's lien foreclosure action is common sense; this includes looking at the amounts actually sought and then balancing them proportionately with what was recovered." Citing Section 38-1-18 UCA 1953 as amended. A.K. & R. Whipple Plumbing and Heating v. Guy, 47 P.3d 92, 93 (Utah App. 2002)

In light of this statement, no one can seriously argue that the "flexible approach" standard adopted in Whipple II and the Palombi "successful party" standard are not now in direct conflict. Whether intentional or unintentional, the court of appeals has supplanted

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[2]Whipple Brief page 10.

their flexible approach (prevailing party) jurisprudence in place of this Court's Palombi jurisprudence.

Whipple argues that *"it is only by this distinction that Aspen [the homeowner and builder] can maintain that its paltry recovery of $527.00 in a case where total claims of $65,780.55 were involved, entitles it to successful party status and thus a significant award of attorney's fees."*[3] Whipple misapprehends the homeowner's and builder's position. First, homeowner and builder are not arguing for the adoption of a "net judgment" rule as controlling either the definition of successful party or prevailing party. Homeowner and builder are merely seeking to have the lower courts enforce §38-1-18 U.C.A. as enacted by the Utah Legislature and as historically interpreted by this Court. Second, as stated previously in the Appellant's Brief (page 23), *"Had the homeowner and builder failed to recover any sum, but still prevented Whipple from obtaining an order allowing foreclosure of its mechanics' lien, they would, pursuant to Section 38-1-18 UCA, be the 'successful party' and ergo entitled to their reasonable attorney's fees in obtaining this result."* This result is what the legislature intended and what this Court has historically interpreted the statute to require. What Whipple fails to acknowledge is that the homeowner and the builder are not arguing for the creation of new law, merely the application of the historical legal standard. Although it may seem somewhat harsh in application, the court of appeals has no legitimate ground to substitute their flexible approach standard under the guise of

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[3]Whipple Brief page 11.

interpreting "prevailing party" in total disregard of the legislature's clear intent in this area of law.

Whipple submits that *"Clearly, these two terms have historically been used interchangeably and while heretofore this may have created some confusion, the Court of Appeals' ruling in Whipple II has finally clarified this issue, eliminating the potential for any future confusion."*[4] This statement is grossly inaccurate for the following reasons: First, prior to Whipple II there was no confusion. Second, had the court of appeals simply held that "prevailing party" and "successful party" were synonymous and then utilized the historical successful party standard (where one is either successful by obtaining a mechanics' lien order of foreclosure or one is successful by preventing and defending against the mechanics' lien foreclosure, Palombi, *supra*, p. 327) there would be no problem. The problem arises when the court of appeals substitutes their jurisprudence for that of this Court and the Utah Legislature.

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[4]Whipple Brief page 13.

B. Whipple Completely Fails to Address the S*tare Decisis* and Legislative Construction Arguments Made by the Homeowner and Builder.

Although Whipple's brief contains a section[5] purporting to respond to homeowner's and builder's argument regarding the judicial presumption that the legislature is satisfied with the Court's construction of the statute by the subsequent enactment of the same statutory language, Whipple's brief avoids the argument completely.

Based upon the doctrine of *stare decisis* alone, the court of appeals' decision should be overturned. The argument for reversing the court of appeals is irrefutable when one considers not only the Court's precedent, i.e., the consistent application of the "successful party" standard enunciated in Palombi v. D & C Builders, *supra,* but also the legislature's enactment and re-enactment of essentially the same statutory language in light of the doctrine of judicial cannons of statutory construction.

The terms "prevailing party" and "successful party," cannot, without exposing the court of appeals to a label of being pro-active, result in any other interpretation than the historical "successful party" standard. By holding that §38-1-18 U.C.A. should now be interpreted to require a "flexible approach" in determining which party is the "successful party," the court of appeals is substituting their judgment for not only this Court, but that of the Utah Legislature. Under principles of separation of powers, it is constitutionally left to

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[5]Whipple Brief at page 15.

the legislature to change a law that is so well entrenched as this statute - particularly when such is done under the guise of interpreting terminology (a function constitutionally accorded the courts), but which is really accomplished by the court of appeals concluding, without any meaningful discussion, that *". . . application of our 'prevailing party' jurisprudence"* does not detract from the legislative intent behind §38-1-18. The bottom line is they have substituted their judgment of which party in a mechanics' lien case should be entitled to an award of attorney fees using somewhat circuitous logic. They have effectively supplanted their jurisprudence for that of this Court and the heretofore mandatory language employed by the Utah Legislature. Whipple II rewrites and redefines the statute's mandatory language that "the successful party *shall* be entitled to recover a reasonable attorneys' fee" to a result where, irrespective of which party was successful in the mechanics' lien case, the trial court is now obligated to apply the court of appeals' flexible approach jurisprudence and look to the amounts sought and then balance them proportionately with what was recovered. This is all accomplished under the rubric of holding that "successful party" and "prevailing party" are synonymous.

This is the argument that Whipple fails to address: §38-1-18 U.C.A. was amended in 1961 and 1995.[6] Each time the terms "successful party" and "shall be entitled" were

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[6]To be historically accurate, the Appellants observe that the pertinent language of §38-1-18 U.C.A. has not changed since 1907:

> "In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee,

retained by the legislature. By holding that the terms "successful party" and "prevailing party" are synonymous but then utilizing a "flexible approach" legal standard, the court of appeals in the guise of interpreting the two terms not only puts their decision at odds with or in opposition to this Court's prior decisions, in contravention to the principles of *stare decisis*, but also acts in total contravention of the judicial cannon of statutory construction.

> "... where a legislature amends a portion of a statute, but leaves other portions unamended, or reenacts them without change, the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent." Rocky Mountain Helicoptering v. Carter, 652 P.2d 893, 896 (Utah 1982) *citing* Christensen and State Insurance Fund v. Industrial Commission and Morrision 642 P.2d 755 (Utah 1982).

If the court of appeals desires to advise the legislature that the legislative standard is too harsh or too restrictive, then they are free to recommend or even lobby for such a change. What they cannot constitutionally do is substitute their judgment under the guise of a function normally accorded the courts (interpreting the law) without rightfully earning the label of being a proactive judiciary which has no respect for the legislature's function or that of the separation of powers doctrine. This is precisely the type of judicial activism the Utah

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> to be fixed by the court, not to exceed $25, which shall be taxed as costs in the action." C. L 17, §3750 (1907).

See §3750 Compiled Law 17 (1907); §52-1-18 Revised Statutes 1933; §52-1-18 U.C.A., 1943. The language eliminating the $25 cap was removed in 1961 by H.B.45, which became effective May 9, 1961.

legislature has been concerned with of late. Recently this Court stated the following with respect to the policy of deferring to the legislature:

> "Moreover, we urge deference to existing remedies out of respect for separation of powers' principles. In general, the legislative branch has the authority, and in many cases is better suited, to establish appropriate remedies for individual injuries. By requiring courts to defer to relevant legislative determinations of appropriate remedies, we respect the legislature's important role in our constitutional system of government." Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist., 16 P.3d 533, 539 (Utah 2000).

C. The Water Line was Part of the Thaynes Canyon Lien.

During the prior two appeals Whipple never argued that the municipal water line relocation was not part of its Thaynes Canyon mechanics' lien claim. The trial record on this point is contrary to Whipple's claim. (See Transcript p.102, 1-23; Addendum 1 [Notice of Mechanics' Lien claiming a lien for $30,647.20]; and Addendum 2 [trial exhibit 12 - identifying the lien claimed with respect to Thaynes Canyon Drive was for $30,647.20].)

Whipple filed a Notice of Claim against Thaynes Canyon in the amount of $30,647.20. (Addendum 1) At trial Whipple presented oral testimony which, as summarized on exhibit 12, identified that it was seeking recovery for work done in the total amount of $50,968.27. (Addendum 2) After giving credit for the $17,000.00 in payments made by the homeowner and the builder, Whipple claimed that the net amount due was $33,968.27. (Exhibit 12 - Addendum 2) This amount was broken down between three properties: 77 Thaynes Canyon - $30,647.20; Diane Quinn residence - $631.00; Thomas Guy pool house - $1,695.92. (Exhibit 12 - Addendum 2) Whipple now seeks to minimize

the amount of the Thaynes Canyon lien in order to avoid the statutory consequences of having filed and attempted (unsuccessfully) to foreclose the lien. Clearly the lien (Addendum 1) and trial exhibit 12 (Addendum 2) speak for themselves.

Whipple was successful in obtaining an Order of Foreclosure with regards to the Diane Quinn and the Thomas Guy pool house liens. Whipple was not successful in obtaining a mechanics' lien foreclosure as to the Thaynes Canyon property, and the statutory consequences of such is that the homeowner and builder, as the successful party, are entitled to their reasonable attorney fees in obtaining this result.

D. What are the Reasonable Attorney Fees?

Whipple asserts that the appellants [homeowner and builder] have incorrectly characterized the standard of review.[7] Homeowner and builder concede that the "standard of review on appeal of the reasonableness of a trial court's award of attorney fees is " 'patent error or clear abuse of discretion.' " Valcarce v. Fitzgerald, 961 P.2d 305, 316 (Utah 1998) (quoting City Consumer Serv., Inc. v. Peters, 815 P.2d 234, 240 (Utah 1991)); Baldwin v. Burton, 850 P.2d 1188, 1198 (Utah 1993). Faust v. KAI Technologies, Inc., 15 P.3d 1266,(Utah 2000). However, in this case it is not a question of the amount. If the trial court had determined that a specific sum was a reasonable attorneys' fee to which the homeowner and builder were entitled (as it did in both the Dianne Quinn and Guy pool house lien) then appellants would concede that they likely could not meet the burden of showing an abuse

[7]Whipple Brief page 2 footnote 1.

of discretion. This, however, is not what the trial court or the court of appeals held. The trial court applied the wrong legal standard and the court of appeals sustained the trial court's decision. Interestingly, prior to Whipple II, the court of appeals explained that in the context of a mechanics' lien case the award of nominal fees by the trial court was an abuse of discretion in light of the statutory mandate provided for in §38-1-18 U.C.A., i.e. "... *the successful party* ***shall*** *be entitled to recover a reasonable attorneys' fee* ...." Govert Copier Painting v. Van Leeuwen, 801 P.2d 163, 174 (Utah App. 1990).

It is respectfully suggested that in light of the statutory mandate, the award of no fees with regards to the Thaynes Canyon lien is also an abuse of discretion.

Conclusion

The application of §38-1-18 is inflexible. In this case, Whipple consciously made a decision to pursue a mechanics' lien, a significant portion of the work for which it was not licensed, i.e., the HVAC portion of the mechanics' lien. Homeowner and builder made their decision to fight the lien because they believed after determining the HVAC system had several problems, and that Whipple was not licensed, that Whipple was not entitled to payment for any portion of the HVAC work (a position which the court of appeals vindicated them in Whipple I) and consequently, that Whipple had over-liened the property. After a four-and-one-half day trial and two appeals, Whipple has failed to obtain an Order of Foreclosure with respect to that lien (Thaynes Canyon). The historical definition of "successful party" as adopted by this court and by the legislature under the cannon of

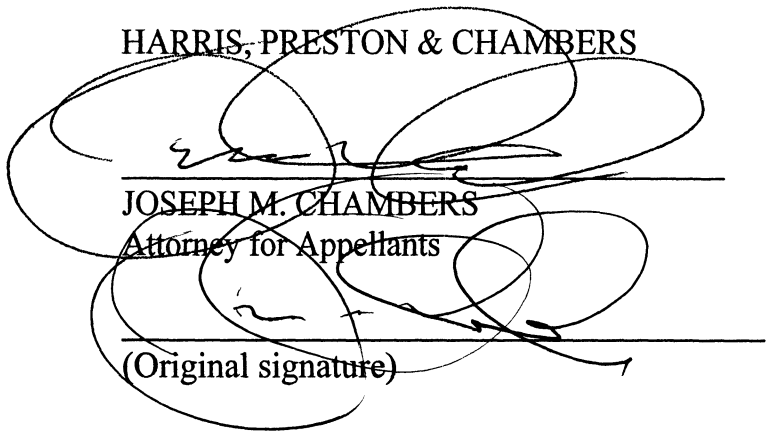
statutory construction (referred to previously) placed both parties on notice that whoever was not successful would be at risk for whatever reasonable attorneys' fee was incurred by the other party in resolving the matter. Whipple has zealously resisted the homeowner and builder at every stage of the proceedings. As a consequence it should not be surprising to discover that the homeowner and builder have incurred significant attorney fees at each of these stages.

The homeowner and builder respectfully request that the court of appeals' decision be reversed and remanded with instructions to award them a reasonable attorneys' fee, including all fees incurred on all appeals. Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998) Salmon v. Davis County, 916 P.2d 890, 895 (Utah 1996); Pacific Development, L.C. v. Orton, 982 P.2d 94, (Utah App. 1999); Social Servs. v. Adams, 806 P.2d 1193, 1197 (Utah Ct.App.1991).

Because the homeowner and builder have appealed Judge Noel's decisions twice before, the Homeowner and Builder respectfully request that the matter be remanded to another district judge with instructions to conduct the necessary evidentiary hearing and other appropriate proceedings to conclude this case.

Respectively submitted this 16th day of April, 2003.

HARRIS, PRESTON & CHAMBERS



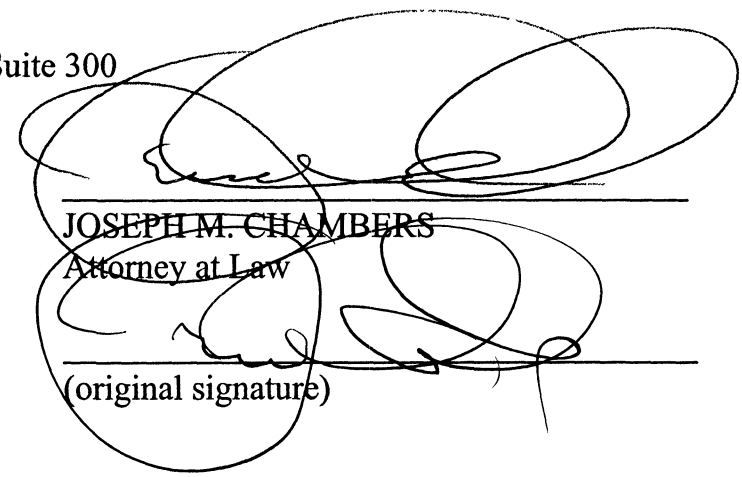
JOSEPH M. CHAMBERS
Attorney for Appellants

(Original signature)

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing APPELLANTS' REPLY BRIEF were mailed, postpaid, to the following this 16th day of April, 2003:

Steven B. Wall
WALL & WALL
5200 South Highland Drive, Suite 300
Salt Lake City, UT 84117



JOSEPH M. CHAMBERS
Attorney at Law

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